No. 14077

United States
COURT OF APPEALS
for the Ninth Circuit

INTERSTATE COMMERCE COMMISSION et al.,
Appellants,

v.

THE MARTIN BROTHERS BOX COMPANY,
a corporation,
Appellee.

BRIEF OF APPELLEE,
THE MARTIN BROTHERS BOX COMPANY

Appeal from the United States District Court for the District of Oregon.

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STATEMENT AS TO JURISDICTION

The appellee, The Martin Brothers Box Company, filed with the Interstate Commerce Commission a complaint against the appellant, Southern Pacific Company, under the provisions of the Interstate Commerce Act, as amended, 49 U.S.C.A., sections 1 et seq. The Commission by order dismissed the complaint. The Commission denied a petition for reconsideration. Appellee

under the provisions of the Urgent Deficiencies Act of 1913, 38 Stat. 219, 28 U.S.C. § 41-43-48, 28 U.S.C.A. § 1336, 1398, 2321, 2322, 2323, 2324, 2325 and section 17 (9) of the Interstate Commerce Act, 54 Stat. 916, 49 U.S.C. 17, petitioned the District Court of the United States for the District of Oregon to set aside and annul this order and to remand the matter to the Commission. The scope of the review of the matter by said District Court is set forth in the Administrative Procedure Act, Title 5, U.S. C.A., section 1009.

The complaint before the I.C.C. is set forth in the printed Transcript of Record (hereinafter designated R.) at pages 77-81; the order of the Commission dismissing the complaint at page 127; the order denying reconsideration at page 128; the amended petition filed with the District Court at pages 3-28.

The authority of a single judge in a case of this character is confirmed in U. S. v. I. C. C., 337 U.S. 426, 69 S. Ct. 1410.

The jurisdiction of the Court of Appeals for the Ninth Circuit is said by the appellants to be based upon section 225, Title 28, U.S. Code.

APPELLEE'S STATEMENT OF THE CASE

The appellee, The Martin Brothers Box Company, deeming the statement in the brief of appellant, Southern Pacific Company, and the statement in the brief of appellant, Interstate Commerce Commission, inadequate and in some respects inaccurate, presents to this Court the following:

Martin, manufacturer since 1909 of boxes and other containers in Toledo, Ohio, desiring an assured supply of lumber for the Toledo plant, purchased a sawmill on the lines of Southern Pacific at Oakland, Oregon, and rights to large quantities of standing timber, in March of 1946. Martin made the decision to acquire the Oakland plant for the reason also that there was a large and profitable market to be had in the west for wirebound boxes for vegetables, fruits and meat products. The Oakland plant is located on the Siskiyou line of Southern Pacific Company, and there is no means of transportation by rail to or from Oakland other than that furnished by Southern Pacific. Prior to the purchase by Martin of its Oakland plant the question of adequate rail transportation was discussed with officers of Southern Pacific, and Southern Pacific was told that Martin was going to start the manufacture of wirebound boxes at its plant at Oakland, and ship lumber for the manufacture of wirebound boxes to its plant at Toledo, Ohio, in addition to the products which were produced by the former owner of the sawmill, and what Martin's freight car requirements would be, and Martin was given assurances that cars could be obtained.

Upon purchasing the mill, Martin enlarged the plant, increasing the car loading capacity from 6 cars to 25 cars, and installing wirebound box making machinery and other equipment.

Before the end of 1946, difficulty in obtaining cars for transporting the products of the Oakland plant was encountered, and the salesmen of Martin were instructed to relax their sales efforts. During 1947, the difficulties in obtaining cars became so aggravated that on October 14, 1947, Martin filed with the Interstate Commerce Commission a complaint demanding, among other things, that Southern Pacific Company be required by order of the Commission to furnish to Martin adequate transportation. By the time the matter came on to be heard before an Examiner Martin's Oakland plant was no longer being deprived of necessary cars by Southern Pacific. There remained the question of reparations for the damages caused during the complaint period, from January 1, 1947, to September 30, 1947, by the failure of Southern Pacific Company to furnish adequate transportation. During this complaint period Martin had business sufficient for the use of and could have used 13 cars per day, and required an absolute minimum average of 8.4 box cars for each working day to transport the products of the Oakland plant in interstate commerce. During this period Southern Pacific Company furnished a total of 593 cars (an adjusted figure, using 2 or 3 refrigerator cars as equivalent to 1 box car), including stock cars, restricted destination cars, refrigerator cars and other inferior cars, or an average of about 3 cars per working day. At the hearing Southern Pacific

Company showed that it had been supplying shippers along its lines, other than Martin, with an average of 80 per cent or better of their transportation requirements.

On the basis of this showing, the Examiner found that Martin, as compared to other shippers on the lines of Southern Pacific Company, had been discriminated against and that this discrimination was in violation of the Interstate Commerce Act, and that Martin was entitled to reparations in the sum of $135,220.56 (R. 106).

To this report of the Examiner Martin filed with the Commission exceptions contending that the amount of reparations should be a larger amount, and otherwise accepting the said report proposed by the Examiner in full (R. 10).

Southern Pacific filed exceptions to the report of the Examiner which are generally referred to in the petition of Martin in the District Court (R. 10 to 18). Thereafter, at the request of Southern Pacific, oral argument of the matter was held before Division 3 of the Commission, consisting of three commissioners. On the 12th day of March, 1951, a report was issued by the Commission by Division 3, containing findings and conclusions, and an order was issued dismissing Martin's complaint (R. 108-127). On May 18, 1951, Martin filed with the Commission a petition for reconsideration and requested oral argument before the entire Commission, and on July 14, 1951, Southern Pacific filed its reply to said petition. Thereafter, on July 30, 1951, at a general session of the Commission, it was ordered that the petition for reconsideration be denied (R. 128).

Thereupon, Martin petitioned the District Court of the United States for the District of Oregon for a review and reversal of the conclusion and determination of the Commission that Martin was not entitled to reparations (R. 3 to 28).

The District Court thoroughly reviewed the entire record, for the purpose, as stated in his opinion, of "determining whether there was a rational basis for the final order of the Commission, and, unless the order is not supported by substantial evidence or is contrary to law, it may not be disturbed" (R. 44). Upon a review of the record and on the basis of the essential facts as found and determined by the Commission, supported by substantial evidence in the record, the Court determined that the conclusion of the Commission was erroneous as a matter of law. Accordingly, the District Court set aside the order of the Commission denying reparations and remanded the cause to the Commission for further proceedings not inconsistent with the Court's opinion, findings and conclusions. (R. 74-75).

This leaves the matter before this Court on this appeal for a determination of whether the conclusions of the Examiner and of the District Court were correct upon the basis of essential facts, or whether the conclusions of the Commission were correct. This issue, which is one of law, will be more fully developed in our argument.

SUMMARY OF ARGUMENT

The Examiner, having found upon substantial evidence, and the Commission, having found upon the same substantial evidence, and the Court, having found upon the same substantial evidence: (a) that during the period in controversy the common carrier in interstate commerce, Southern Pacific Company, furnished and supplied all shippers using its transportation facilities, other than the complainant, The Martin Brothers Box Company, with from 80 per cent to 100 per cent of the transportation requirements of such shippers; and (b) that during this period the complainant shipper in interstate commerce, The Martin Brothers Box Company, was furnished and supplied by this carrier substantially less than 50 per cent of the transportation desired and requested; and (c) that damage in substantial amounts was sustained by the shipper, The Martin Brothers Box Company, by this failure of the carrier to furnish the required and requested transportation, is the conclusion of the Commission, that the complaint of the shipper demanding adequate transportation and reparations for past failure to furnish adequate transportation should be dismissed, a proper legal conclusion in view of the provisions of the Interstate Commerce Act.

ARGUMENT

Duty of Carriers

Respecting the law as defining the duties of Southern Pacific, which is admitted to be a common carrier engaged in transporting property in interstate commerce

and subject to the Interstate Commerce Act, we summarize the applicable statutes as follows:

Section 1 (4) of the Interstate Commerce Act (49 U.S.C.A. § 1) makes it the duty of every common carrier subject to the act engaged in the transportation of passengers or property to provide and furnish such transportation upon reasonable request therefor.

Section 1 (11) requires that every such common carrier furnish adequate car service, and establish, observe and enforce reasonable rules and practices with respect to car service; and every unjust practice with respect to car service is prohibited and declared to be unlawful.

Section 3 (1) makes is unlawful for any common carrier subject to the act to make, give or cause any undue or unreasonable preference or advantage to any particular person, company, corporation or locality, or to any particular description of traffic, or to subject any particular person, company, corporation or locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Common carriers are obliged to distribute the cars they have available on a reasonable basis. According to Brownsville etc. v. St. Louis etc., Ry. Co., 91 F. (2d) 502, the Transportation Act of 1920 (§ 1 (11) supra) makes it the duty of a common carrier by railroad to furnish the shipper, upon reasonable request, with necessary cars for the movement of property to be shipped, and exacts what is reasonable from carriers who transport freight in railroad cars.

Penn. Ry. Co. v. Puritan Coal Mining Co., 237 U.S. 121, holds that the law exacts what is reasonable from carriers, and "at the same time, requires that they should be equally reasonable in the treatment of their patrons. In case of car shortage occasioned by unexpected demands, they are bound to treat shippers fairly, if not identically."

Midland Valley R. Co. v. Barkley, 276 U.S. 482, holds that the law exacts what is reasonable from such carriers.

A Commission decision, Ayrshire Coal Co. v. Southern Ry. Co., 96 I.C.C. 161, states as follows:

> "It is the duty of a carrier to furnish reasonable car supply and make a reasonable and equitable distribution of such cars as it has available."

We think that under these statutory provisions, according to their plain language and as construed by the United States Supreme Court and by the Commission itself, there can be no question concerning the duty of Southern Pacific to have furnished and supplied railroad cars to Martin for transportation of Martin's products, in substantially the same proportion and ratio in times of car shortage as was furnished other shippers in the same or other territories along Southern Pacific's lines. It was, of course, the duty of Southern Pacific in ordinary times, and assuming no car shortage, to furnish Martin all the cars requested and required for transportation of Martin's products in interstate commerce. In time of shortage, it was the duty of Southern Pacific to make a reasonable and equitable distribution to Mar-

tin of its pro rata proportionate share of the available supply of cars.

Judicial Review

The trial judge, in his opinion (R. 44), outlined the duties of the court upon a review of the decision of the Interstate Commerce Commission, as follows:

> "There is no substantial dispute between the parties as to the scope of review by this court of the Commission's order. This court, according to United States v. Interstate Commerce Commission, (D.C. Cir. 1951), 198 F. 2d 958, 964, is
>
> 'to apply the standards of judicial review which are generally applicable to administrative action—the standards reflected in the Administrative Procedure Act, § 1 et. seq. 5 U.S.C.A., § 1001 et. seq., and in such decisions as Universal Camera Corp. v. N. L. R. B., 340 U.S. 474, 71 S. Ct. 456, 95 L. Ed 456; United States v. Carolina Freight Carriers Corp., 315 U.S. 475, 489, 62 S. Ct. 722, 86 L. Ed. 971; Gray v. Powell, 314 U.S. 402, 412, 62 S. Ct. 326, 86 L. Ed. 301; Rochester Telephone Corp. v. United States, 307 U.S. 125, 129, 59 S. Ct. 754, 83 L. Ed. 1147; and Chicago Junction Case, 264 U.S. 258, 265, 44 S. Ct. 317, 68 L. Ed. 667.'
>
> "In other words, this court is limited to determining whether there was a rational basis for the final order of the Commission, and, unless the order is not supported by substantial evidence or is contrary to law, it may not be disturbed."

Later in the opinion the trial court indicated (R. 56),

> "I previously indicated that the court is charged with the duty of determining whether there is a rational basis for the Commission's conclusions. Or, stated differently, whether the Commission's conclusions are supported by substantial evidence, considering the whole record, and whether, in arriving at those conclusions, it correctly applied the applicable law."

In the case of New York Central Ry. Co. v. U.S., 99 F. Supp. 394 (342 U.S. 890, 72 S.C. 201, Aff'd without opinion,) the Court reviewed an order of the Interstate Commerce Commission cancelling certain new rate schedules of certain railroads. The Commission's decision was attacked as being erroneous in law, unsupported by essential basic findings, and unsupported by substantial evidence on the record as a whole. The Court entered judgment setting aside the order of the Commission. The Court said (p. 401):

> "The Commission does have the duty to set forth in its report the 'basic' or 'essential' or 'quasi-jurisdictional' findings necessary to support its ultimate conclusion, though it must be recognized that such requirement is sometimes obscured in vague questions of degree." And further: "As stated in United States v. Pierce Auto Freight Lines, Inc., 1946, 327 U.S. 515, 533, 66 S. Ct. 687, 90 L. Ed. 821, an ultimate finding is not enough in the absence of a basic finding to support it. Where the ultimate finding, as here, is in the negative form, the report must contain sufficient basic findings of fact to warrant a reviewing court in concluding that the Commission was not without rational grounds for refusing to find, as the case might be, that the proposed schedules are 'just and reasonable' . . . "

With these statements of the scope of judicial review in mind, let us now turn to the record to determine whether the trial judge misapplied any of these principles as contended by the appellant, Southern Pacific Company, and the appellant, Interstate Commerce Commission.

We have divided the factual situation into five subheadings, which we will discuss in order.

Martin's Freight Car Requirements

The record shows without any dispute whatsoever that during the complaint period The Martin Brothers Box Company was manufacturing at the Oakland, Oregon, plant sawn lumber and rotary cut lumber, or veneer, and wirebound boxes made from lumber. Transportation of these products required only box cars. Martin had no use for stock cars or flat cars or gondola cars or refrigerator cars, except as a desperate substitute for lacking box cars.

Based upon competent and satisfactory evidence, the Examiner found, and the Commission found, and the trial court found the following to be established facts concerning the railroad car requirements of The Martin Brothers Box Company for transporting the products of the Oakland plant during the entire complaint period from January 1, 1947, to September 30, 1947, inclusive:

Martin intended to continue operation of the lumber mill bought in 1946 and estimated that about 5 or 6 cars would be needed each day for shipment of lumber. Martin intended to (and did) enlarge the plant, installing machinery and producing boxes, and estimated that from 3 to 4 cars would be needed each day for shipment of the boxes produced for each eight-hour shift. With two shifts operating, freight car requirements of the plant would be 13 cars per day.

District Court finding - R. 45-46
Commission finding - R. 110
Examiner's finding - R. 86

By letters dated July 30 and August 6, 1946, Martin informed Southern Pacific of an immediate minimum requirement of 36 cars per week or 150 cars per month, and that the needs of the Oakland plant would be increasing to about 250 cars a month.

District Court finding - R. 46
Commission finding - R. 110-111
Examiner's finding - R. 87

A representative of Martin, while endeavoring to secure more cars from Southern Pacific, in a discussion with a representative of Southern Pacific, was told that Martin's fixed quota was only 5 cars per day, and was later told that the quota would be doubled to 10 cars a day, although there was doubt because of the car shortage that Martin would be given more than 50 per cent of its quota.

District Court finding - R. 47
Commission finding - R. 112
Examiner's finding - R. 88-89

The Oakland agent of Southern Pacific knew that Martin required cars in addition to those being furnished by Southern Pacific, and attempted to obtain additional cars for Martin through various other officials of Southern Pacific.

District Court finding - R. 47
Commission finding - R. 113
Examiner's finding - R. 89

Martin had orders from customers sufficient for operation of the Oakland plant at capacity during the entire complaint period, but for lack of cars was only able to operate one shift and for periods of time was required to cease operations.

District Court finding - R. 47-48
Commission finding - R. 113
Examiner's finding - R. 89

Martin required about 65 carloads of lumber a month to keep each shift of the Toledo plant operating, but because of failure of Southern Pacific to furnish cars was able to ship to Toledo only 142 cars during the entire complaint period and the Toledo plant ceased two-shift operations March 18, 1947.

District Court finding - R. 48
Comission finding - R. 114
Examiner's finding - R. 90

The Oakland agent of Southern Pacific admitted that he knew Martin wanted and desparately needed more cars than Martin received, and this agent acknowledged that Martin demanded more cars than were furnished.

District Court finding - R. 47
Commission finding - R. 119
Examiner's finding - R. 95

The Examiner made a finding and determination that Southern Pacific, "knew or should have known that complainant's minimum car requirements were more than 150 cars a month and that defendant should have furnished to complainant about 80 per cent of its requirements, the percentage figure that it admits were furnished on the average to other shippers on its lines during this period" (R. 98), and on this basis the Examiner "concluded that complainant should have been furnished an average of 6 cars each working day" (R. 104).

The Commission, while not making specific findings as to the daily or monthly car requirements of Martin, did specifically find that Martin had orders from customers requiring operation of the Oakland plant at full capacity during the entire complaint period (R. 113) and also did specifically find that with two shifts operating the freight car requirements were 13 cars each day (R. 110). The Commission further specifically determined as one of its Conclusions "that complainant desired, required, and attempted to secure additional cars from defendant" (R. 125).

The District Court found "in view of the productive capacity of plaintiff's lumber and box manufacturing plants at Oakland and the information concerning such operations which were communicated to defendant and of which defendant had personal knowledge, plaintiff was entitled to a quota in excess of 5 cars a day. However, even on the basis of only 5 cars a day, the evidence showed that the plaintiff did not receive its proportionate share of the freight cars as compared to freight cars received by other shippers" (R. 65-66). Earlier in his opinion the District Court, referring to the conclusion of the Commission that "complainant desired, required, and attempted to secure additional cars from the defendant;" determined that the findings of the Commission relative to the attempts of Martin to secure additional freight cars are supported by substantial evidence and form an adequate basis for this conclusion (R. 61) of the Commission.

Requests For Cars

Having discussed the freight-car requirements of Martin, we now turn to the subject of the reasonable requests made by Martin for the supply of such cars required.

In the report of the Commission (as well as that of the Examiner) it is specifically found, based upon competent and satisfactory evidence in each instance, as far as concerns requests for transportation, as follows:

1. Before purchasing the Oakland plant in 1946, Martin's president discussed car requirements with officers of Southern Pacific and was given assurances that cars could be obtained.

District Court finding - 45
Commission finding - R. 110
Examiner's finding - R. 86

2. By letters in 1946, Martin informed Southern Pacific of its even then desperate need for cars and that the immediate minimum requirements were 36 cars per week or 150 cars per month and that the needs would be increasing to about 250 cars per month.

District Court finding - R. 46
Commission finding - R. 111
Examiner's finding - R. 87

3. At various times prior to and during the first nine months of 1947, Martin's officers and other personnel complained to Southern Pacific that adequate cars were not being received and that additional cars were urgently needed to fill orders of producers of perishable commod-

ities, which, in turn, urgently needed the containers for shipment of their produce, and for shipments of lumber to the Toledo plant.

District Court finding - R. 46
Commission finding - R. 111
Examiner's finding - R. 87

4. Martin's salesmen were notified to stop taking further orders and at different intervals were permitted to come to Oakland in an effort to aid in the attempt to obtain more cars from Southern Pacific.

District Court finding - R. 46
Commission finding - R. 111
Examiner's finding - R. 88

5. One of the salesmen testified at the hearing that he spent one and one-half months in Oakland during the fall of 1946, and three months during the spring of 1947, during which time he exerted all his efforts to obtaining more cars. He made daily telephone calls each morning before 7:45 A. M. to the office of Southern Pacific's local freight agent at Roseburg, Oregon, and went over the switch list with Southern Pacific's employees to ascertain how many cars, if any, were to be spotted at Martin's plant that day.

District Court finding - R. 46-47
Commission finding - R. 111-112
Examiner's finding - R. 88

6. On several occasions this employee induced Southern Pacific's employees to reconsider and assign a car for Martin's plant, and, "He made trips to Medford, Oreg., and called on the defendant's division freight and passenger agent who agreed to do all he could to afford relief."

District Court finding - R. 47
Commission finding - R. 112
Examiner's finding - R. 88

7. He also called on Southern Pacific's Freight Traffic Manager at Portland and pleaded for cars.

District Court finding - R. 47
Commission finding - R. 112
Examiner's finding - R. 88

8. Southern Pacific maintained an agent at Oakland, who was in daily contact with Martin's plant and sometimes went there two or three times a day. In addition, one of Martin's employees generally visited Southern Pacific's office at Oakland, both in the forenoon and afternoon of each day. While there he often called the Southern Pacific's office at Eugene with respect to the assignment of cars for Martin.

District Court finding - R. 47
Commission finding - R. 113
Examiner's finding - R. 95

9. In the period subsequent to June 30, 1947, the distribution of cars to shippers on the Portland Division, including Martin, was made on a percentage-of-quota basis.

District Court finding - R. 51
Commission finding - R. 118-119
Examiner's finding - R. 94-95

10. At this point we inject a quotation from the testimony of Mr. Bogan, the Oakland Agent of Southern Pacific:

"Q. You knew they wanted more than they were getting?

A. Yes, because they were loading trucks with boxes and hauling them out.

Q. Did that indicate to you they were pretty desperate for cars?

A. Sure.

Q. Didn't you have occasion to complain to Martin Box that Stapleton was using your telephone too much?

A. That was—he did use it, yes. He talked to the car man also.

Q. He talked to the man at Eugene?

A. Yes, and he told us he couldn't do it, it was against the rules or something like that.

Q. The Eugene man told you he was using Southern Pacific's phone more than Southern Pacific was, isn't that a fact?

A. That's right, that's about it all right. He wanted to find out what cars he was getting and so in order to spot the cars at, if he wanted them at the mill or the box plant or where he would want it" (R. 639).

11. Also Mr. Fred J. Martin, President of Martin, personally went to San Francisco to see officials of Southern Pacific in the endeavor of securing some relief from the car shortage, and was told to see Mr. Nelson, Southern Pacific Freight Traffic Manager, in Portland, and Mr. Martin did go to Portland and did see Mr. Nelson, being, according to Mr. Nelson, "very much upset about the fact that he couldn't get sufficient cars to satisfy him, that he was also particularly concerned about the fact, as he stated to me, that we would not permit Southern Pacific cars to go off-line, that is, to some connection of the Southern Pacific beyond the Southern Pacific" (R. 602-603).

12. Also D. J. Martin, Manager of the Toledo, Ohio, plant of Martin, on August 1, 1947, (Exhibit 12) sent the

following Western Union Telegram to the Freight Traffic Manager, Southern Pacific Railroad, Portland, Oregon, and on the same day sent an identical telegram to the Vice President of the Southern Pacific Railroad at San Francisco:

> "Your failure to provide adequate empty cars for our Oakland Oregon plant means that substantial movement of material for our Toledo plant has been practically eliminated. It has become necessary for us to purchase southern hardwoods in lieu of fir produced at our Oakland plant. This means loss of movement to you entirely. Our trade prefers boxes produced from fir of our own manufacture. In six weeks only two cars have been loaded from Oakland whereas thirty cars of material were required and released. If situation continues movement will be killed completely by complete diversion to southern hardwoods.
>
> "What immediate action can be expected. Wire or telephone us Toledo" (R. 784).

13. On September 25, 1947, The Martin Brothers Box Company sent a telegram to L. P. Hopkins, Southern Pacific Superintendent at Portland, from Oakland, reading (Exhibit 12-R. 787): "Cars promised us last two days not arriving. Situation desperate."

Not only was reasonable request for transportation made as the statute requires, but every possible effort was made by Martin to secure cars.

The trial judge thoroughly considered this phase of the case. His opinion in this regard first states (R. 56-57):

> "I previously indicated that the court is charged with the duty of determining whether there is a rational basis for the Commission's conclusions.

Or, stated differently, whether the Commission's conclusions are supported by substantial evidence, considering the whole record, and whether, in arriving at those conclusions, it correctly applied the applicable law.

"In my opinion, the statement set forth in the second paragraph of the conclusions correctly set forth the rules of law relative to the distribution of cars by a railroad. A railroad, under § 1 (4), § 1 (11) and § 3 (1) of the Act is required:

"1. To furnish transportation upon reasonable request.

"2. To establish and enforce reasonable rules with respect to car service.

"3. To refrain from causing any undue influence or unreasonable preference or advantage to any particular person, company, locality, or territory.

"4. To treat shippers fairly, if not identically, in case of a car shortage.

"There remains the question of whether the other conclusions are supported by substantial evidence and are not contrary to law."

The Judge then continues (R. 58):

"The findings of the Commission, heretofore summarized, and the evidence upon which such findings are based, show the continuous request of plaintiff to secure additional box cars to partially satisfy its urgent need for such cars.

"In spite of defendant's knowledge of the needs of plaintiff and its almost daily requests for such cars, defendant contends that such requests do not meet the requirements of specificity demanded by the Act."

And then after showing the non-applicability of the cases cited by Southern Pacific, the trial judge quoted

the conclusion of the Commission (R. 61) that "complainant desired, required, and attempted to secure additional cars from the defendant;" and determined that "The findings of the Commission heretofore summarized relative to the attempts of plaintiff to secure additional freight cars are supported by substantial evidence and form an adequate basis for this conclusion of the Commission."

Later in the opinion (R. 65) Judge Solomon stated:

> "I have previously held that the written car orders placed by plaintiff with the defendant were no indication of the number of cars required, needed, or requested by the plaintiff and that the plaintiff made reasonable requests within the meaning of the Act for all of the freight cars which it required."

It thus appears with no doubt whatever that the Commission and the trial judge also determined and concluded, upon the basis of substantial evidence, that Martin made reasonable requests for transportation in accord with the Interstate Commerce Act.

Failure To Furnish Cars

The next matter for consideration is whether during the complaint period Southern Pacific supplied to Martin an adequate supply of box cars for transportation of Martin's products in interstate commerce.

First in this connection an explanation of the term "reefers" is in order. Southern Pacific spotted on Martin's track 131 refrigerator cars, called for short reefers. These cars are highly undesirable and unsatisfactory.

Mr. Nelson, Freight Traffic Manager of Southern Pacific, explained (R. 631) that the doors are not wide enough to load lumber. Mr. Holland, a representative of Martin, testified (R. 286) that it is practically impossible to get a hoister or any mechanical conveyor into a reefer to unload the boxes, which means that they must be handled manually, and that with customers having small plants the spotting of several reefers instead of one car meant one or more days delay in loading or unloading due to switching difficulties.

The Commission found that Martin was furnished 593 cars during the period from January 1 to September 30, 1947, inclusive, or an average of about 3 cars per day. (R. 113). The Commission adjusted the number of cars furnished to reflect the regulations of a Service Order of the Commission permitting the use of two or three refrigerator cars in place of one box car.

Southern Pacific put in evidence Exhibit No. 41 (R. 817) showing that Martin was supplied during the nine months complaint period with 499 box cars, 131 reefers, 9 stock cars (Martin was shipping no cattle), 16 flat cars and 9 gondolas (Martin was shipping no coal). This totals 664 cars. Southern Pacific also put in evidence Exhibit No. 42 (R. 818 to 843), designated a Statement Showing Daily Check of Freight Cars on Spur Track of The Martin Brothers Box Company at Oakland During the Period January-September, 1947, inclusive, and showing a total of 654 cars of all classes spotted from January 2 to September 30, 1947, inclusive. This exhibit shows that 11 cars were spotted under load, and 5 cars

were spotted but were to be cleaned by Southern Pacific before being loaded, and one car was shown to have been removed from the spur track to be cleaned (and was never returned), and 131 cars were reefers. Deducting the reefers and the cars spotted under load and the car removed for cleaning and not returned, there remains during the nine months period 511 cars supplied by Southern Pacific to Martin for transportation of Martin's products, of which 34 cars were stock cars, flats or gondolas.

The Commission, as above stated, found that during the complaint period Martin was furnished 593 cars or an average of about 3 cars per working day. This number is the adjusted number above referred to. A summary of the cars furnished as taken from Exhibits 41 and 42 put in evidence by Southern Pacific shows the furnishing of 477 satisfactory box cars, 34 stock cars, flats and gondolas, useable only in extreme emergency, and 131 reefers, which were unloadable for lumber, unacceptable for boxes and of restricted destination to California (R. 511, testimony of Mr. B. T. Ayers, Southern Pacific Company's Superintendent of Freight Car Service; and Southern Pacific's Exhibit No. 34—R. 798-802).

The number of cars required by The Martin Brothers Box Company during this complaint period and for which reasonable requests were made approximated 1,600, and the number furnished by Southern Pacific, with over-generous calculation in favor of Southern Pacific, was 593 cars, or considerably less than half of the number of cars requested and required.

Cars Furnished Other Shippers

With this in mind, let us turn now to the record as to the cars furnished to other shippers during the same period.

Southern Pacific Company put in evidence Exhibit No. 31 (R. 797), which had been prepared under the direction of Mr. Ayers, which showed cars ordered and furnished by Southern Pacific during the first nine months of the year 1947. This exhibit showed and this witness testified that between December 29, 1946, and October 4, 1947, an overall average of 80 per cent of the box, flat and gondola cars ordered were furnished shippers on all divisions of Southern Pacific Company, including the Portland Division (R. 507-508).

The Examiner found and the Commission found that during the period in question Southern Pacific furnished an overall average of 80 per cent of the car requirements of shippers upon its lines other than The Martin Brothers Box Company. The trial judge analyzed this situation by months during the complaint period (R. 64-68) and showed that during some months there was no general shortage of box cars, and that during the periods in which there was little or no shortage of box cars on the Portland Division, The Martin Brothers Box Company, nevertheless, received only a small portion of the cars which it required.

The Commission and the trial judge found as a fact that Mr. W. F. Forrest for The Martin Brothers Box Company traveled 7,752 miles in making a survey of

other shippers on the lines of Southern Pacific and found no shortage of cars with any shipper at competitive points. He also during the complaint period was Traffic Manager for Timber Structures, Inc. at Portland, Oregon, and requested many cars from Southern Pacific and experienced no difficulty in obtaining cars (R. 304-308). The trial judge remarked (R. 66), referring to the testimony of Mr. Forrest, "This testimony was uncontradicted and, in my opinion, is corroborated by the defendant's own evidence."

At the hearing Martin put in evidence Exhibit No. 47 (R. 791-794), which was an excerpt from a transcript taken before the Interstate Commerce Commission on April 30, 1947, at a hearing on an application of a water carrier for additional operating authority. The excerpt consisted of testimony by a representative of Southern Pacific Company, who claimed that it was at that time experiencing no shortage of cars available for shippers.

District Court finding - R. 50
Commission finding - R. 116
Examiner's finding - R. 92

Reparations

On the basis of the record so made, the trial court determined as a matter of law that the discrimination against The Martin Brothers Box Company so practiced by Southern Pacific Company was in violation of the Interstate Commerce Act, and The Martin Brothers Box Company was entitled to reparations for the damages

sustained. On the matter of reparations, Martin had prayed in the petition before the trial court that the matter be remanded to the Commission with specific directions to award Martin such damages as the Court should find Martin to be entitled to under the evidence, and for further action not inconsistent with the Court's judgment. The trial court determined (R. 73) that the record contains evidence of damage to support an award of reparations and that Martin was entitled to have the matter remanded to the Commission for further proceedings in conformity with the opinion.

The matter is before this Court now upon the sufficiency of the conclusions of the trial court and not upon the question of the amount of reparations.

The record in this proceeding before the Commission and before the District Court shows, and as to the facts the Examiner and the Commission and the District Court found as facts of the matter, upon clear and satisfactory evidence, that during a period of car shortage generally:

(1) The Martin Brothers Box Company desired and required for transportation of its products in interstate commerce and attempted to secure from the common carrier, Southern Pacific Company, the only source of railroad interstate transportation from Oakland, Oregon, approximately 1,600 freight cars during the complaint period;

(2) Martin made requests, demands and prayerful importunities for car service, to every official of South-

ern Pacific Company, from the lowly station agent at Oakland to the vice president in San Francisco;

(3) Martin was given a supply of cars amounting to about one-third of Martin's requirements during the complaint period;

(4) Other shippers along the lines of Southern Pacific with heavy pay-bottom loads and situate where Southern Pacific had competition with other rail carriers secured during this period from Southern Pacific from 80 per cent to a full 100 per cent of their car service requirements;

(5) The damage to Martin by this discrimination was substantial and costly.

Every essential element necessary to the establishment of Martin's claim has been resolved both by the Commission and by the District Court, in favor of Martin and against Southern Pacific Company.

The inexplicable conclusion of the Commission, which was held by the District Court to be contrary to the Interstate Commerce Act, that on the facts so found Martin was not entitled to any relief, will be discussed in connection with our consideration of the briefs of the two appellants.

THE BRIEF OF APPELLANT, INTERSTATE COMMERCE COMMISSION

The Interstate Commerce Commission is a party in this case, not by virtue of any interest in the subject matter, but solely by virtue of statutory necessity. Title 28, Section 2322, U.S.C.A., provides that an action to set aside an order of the Interstate Commerce Commission shall be brought by or against the United States. In this particular case the United States, through the Attorney General, filed an answer but did not participate further before the District Court and has taken no appeal from the District Court decision. The Commission, however, has become an active and biased advocate of the railroad.

The brief of the Commission contains, after a statement as to jurisdiction, a statement of the case. This statement is inaccurate in the following respects:

(1) It states (p. 5) that the order of the Commission is "here under attack," whereas this appeal is by the railroad and the Commission to sustain the order of the Commission and attacks and tries to upset the judgment of the District Court.

(2) The statement describes the conclusions of the Commission as "ultimate finding" (p. 5 and 8), thus adopting the device used by the appellant, Southern Pacific Company, of attempting to twist legal conclusions of the Commission into findings of fact. This device is used throughout the briefs of both appellants. In the Commission brief on page 8 the words "findings of ulti-

mate fact" and "ultimate finding" both appear in the Specification of Errors, and the Commission states to this Court that the Court below could do no more than determine whether the Commission's "ultimate findings of fact are supported by substantial evidence on the record as a whole, and whether such record contains substantial evidence to support its ultimate findings."

The report of the Commission is set forth in the record at pages 108 to 126, inclusive. It contains 17 pages of findings of fact. After discussion of the facts for 17 pages, the report contains a heading, "Conclusions", and under this heading the Commission concluded as a matter of law that the defendant railroad had not been shown to have unduly favored shippers other than Martin, and Martin had failed to establish a violation of the Interstate Commerce Act, and had failed to present evidence sufficient to support an award of reparation. These conclusions received detailed attention by Judge Solomon in his opinion (R. 61-73 inclusive), and more particular reference will be made to them in our discussion of the brief of Southern Pacific Company.

In the brief of the Commission following this misdescription of these conclusions of law is an argument concerning the scope of judicial review of Commission orders. This contains a discussion of cases of the Supreme Court of the United States and other courts, referring generally to the nature of the judicial function in reviewing orders of administrative tribunals. The discussion does not inform the Court of the existence of the Administrative Procedure Act of June 11, 1946,

(Title 5 U.S.C.A., Sections 1001-1011). The judicial review section of this Act (Section 1009) grants to any person suffering legal wrong because of any agency action, or aggrieved thereby, judicial review thereof. The reviewing court shall hold unlawful and set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law, or, (2) not supported by substantial evidence. This is the nature of the review to which Martin was entitled in the District Court under this Act and under the decision of the Supreme Court of the United States in U.S. v. I.C.C., 337 U.S. 426, to which reference is made in the statement as to jurisdiction in the brief of the appellant Commission.

The nature of the judicial review to which a party, aggrieved by an order of the Interstate Commerce Commission, is entitled, is delineated by Judge Solomon in his opinion in this case, which we have heretofore quoted in part, and also by Judge Magruder in N. Y. Central R. Co. v. U.S., heretofore referred to in this brief. We see no occasion for further elaboration on the nature of the review to which Martin was entitled or the duties of Judge Solomon as a reviewing judge. Judge Solomon determined that the findings of fact of the Commission were based upon substantial evidence and that the conclusions of law of the Commission were arbitrary and capricious and not in accordance with law and not supported by substantial evidence.

The brief of the Commission next proceeds with a recital of portions of evidence in the record, upon the

basis of which the Commission made its findings of fact. This recital is of little assistance to this Court, since the Commission is in no wise attacking its own findings of fact contained in its report. We desire, however to correct several inaccuracies in this recital of the evidence.

The Commission states in effect (p. 26) that the Freight Traffic Manager of Southern Pacific Company testified that the movement of traffic out of the Martin Brothers plant ranged from as little as 17 cars a month to over 100 cars a month. The brief neglects to state that this witness corrected this statement before leaving the witness stand (R. 632-633), stating, "As a matter of fact I'm incorrect in my statement because it was in the month of April, 1945, when Wilson Timber Company owned the mill. I'm sorry. I didn't intend to do that. I will give you the minimum number of shipments that Martin shipped in the time he was in control, if you want."

On page 28 the Commission states that the evidence shows that there was a "critical shortage" of cars on the Southern Pacific, "a fact admitted by appellee's president". Southern Pacific's own records showed no critical shortage at any time during the complaint period. As Judge Solomon pointed out, during the many months of the complaint period, according to the evidence Southern Pacific had submitted, there was no shortage of box cars. In addition, the president of Martin was speaking (R. 177-178) only about his company's being shorted and not about Southern Pacific's being short of

cars. By no stretch of the imagination can the testimony of the president be construed as indicating or implying a critical or other shortage of cars on the lines of Southern Pacific. He was plainly speaking about the failure of Southern Pacific to deliver cars to his plant at Oakland.

On the following page (p. 29) the Commission refers to demurrage rules and regulations, impliedly suggesting that demurrage was charged to Martin, whereas there is not one iota of evidence in the entire record of any demurrage charged against Martin, and it must be presumed that appellant, Southern Pacific, would have produced any such evidence favorable to its cause, if any existed.

On page 29 the Commission states that the record shows that Martin was furnished all the cars for which it placed specific orders during the nine-month period covered by the complaint. This same theme runs throughout the brief of Southern Pacific, expressed in different fashion on different pages, but all intended to induce this Court to believe that no requests for cars were made by Martin which were not recorded on a written order form either by an agent of Southern Pacific or an employee of Martin. In answer to this contention it should be stated, in the first place, that there is no statutory provision in the Interstate Commerce Act, or otherwise, that requests for cars must be anything other than "reasonable". Southern Pacific admittedly had no tariff schedule or rule of any kind requiring written orders for cars, and admits having filled many and possibly practically all requests of shippers for cars by

phone or oral requests of one kind or another. Southern Pacific admits having delivered to the siding of Martin during the complaint period, pursuant to requests of one kind or another made by Martin, a total of 664 cars, or an adjusted total of 593 cars, while asserting that Martin only ordered 565 cars, and that written car order forms in possession of Southern Pacific, but not in the record in this case, show requests during this period for only said 565 cars.

The record conclusively shows that cars were furnished to Martin during the complaint period without any reference whatsoever to the so-called specific order forms continually referred to by Southern Pacific. To begin with, at no time during the complaint period did Southern Pacific spot on Martin's track any specific car in response to any particular written form. Mr. Bogan, the Southern Pacific agent at Oakland, testified (R. 638):

> "Q. Did they know it at Eugene, what cars Martin Box could have?
>
> A. Yes, most of the time they did. That's what we were doing, called Eugene lots of times to find out how many we were going to get.
>
> Q. Then when you found that out, an order would be placed?
>
> A. Yes.
>
> Q. Is that right?
>
> A. That's right."

Mr. Bogan further testified (R. 638), "while I was down at the mill or something like that, they wanted certain cars, then I'd make out the order when I got up to the depot and I'd put the order number and send it in. The orders were sent to the Eugene office."

The next step in this order form process has been described by Mr. J. R. Robinson, Special Clerk, Bureau of Transportation Research, Southern Pacific (R. 566-590), who in January, 1948, after the complaint in this matter had been filed with the Commission, came to Oregon and studied these forms. He said he took the list of cars placed on the tracks of Martin and these forms and by a process of "counting" two for one and three for one made the two jibe. For example, he was asked (R. 574):

> "Q. In each of these cases, did you check the original car order before deciding how the reefers should be counted, is that right?" and he answered:
> "A. That's right."

Again (R. 575) he was asked:

> "Q. Order 381, five reefers furnished. How did you count the first three?"

And the answer was:

> "A. I broke them down a little different from that. The first two I counted as one, the next two as one and then the next fella I threw in with the other six cars and I counted those as two cars."

Further with reference to these forms is the testimony of this witness as to their alteration by employees of Southern Pacific. We quote from Mr. Robinson's testimony (R. 586-587) as follows:

> "Q. (By Mr. Schafer) I just have one question or so, Mr. Robinson. Refer, please, to the original of what you call a car order for the date June 16th. I note that it shows the order placed June 16, but orginally when you came to the place where you show the cars applied to fill the order, it shows that that car was actually furnished on the 14th. Then

later someone has scratched out in blue pencil the 14th and written in there 'spotted 11 a. m., 18th'. Do you know anything about that?

A. That's none of my writing. It was on there.

Q. I note throughout this sheaf of original car orders notations in blue pencil; you don't know who put those notations in there, do you?

A. I believe the auditors of the Pacific Car Demurrage Bureau—they are required to go to the various stations on the railroad and check the preparation of the car demurrage sheets and also the underlying documents of the car orders to see that agents are complying with the preparation of those documents. I believe that was an auditor's marks."

The Commission found in its report (R. 119-120) with respect to these "orders" as follows:

> "Under normal conditions it is the practice for shippers to order the specific number of cars wanted, and therefore, the defendant insists that inasmuch as the complainant received more cars than were specifically ordered, it has no legitimate reason to complain that the distribution of cars made was other than reasonable. The complainant indicated generally that it wanted more cars than were furnished and this is admitted by the Oakland agent of the defendant. It appears that the written car order blanks, which were filled out and given to the defendant's agent after the complainant knew what cars had been assigned to it for the particular day, were to a large extent nothing more than a written confirmation, for the defendant's records, that the complainant wanted the cars that had been assigned to it for that day."

Previously the Examiner had made the same finding in identical language with that of the Commission, and Southern Pacific filed exceptions to this finding as follows:

> "To the finding of the Examiner that it was the usual practice of complainant's employee to ascertain from defendant's office at Eugene how many cars had been assigned to complainant and then place complainant's order only for cars so assigned (last sentence of last full paragraph on sheet 6). This exception is made on the ground that such finding is unsupported by the evidence *which only showed this practice to be occasional . . .* " (R. 12; Emphasis supplied).

And again there is the undisputed evidence in the record that Mr. Bogan sent the order forms to Eugene, and that the cars supplied were "counted" against these forms, but at the same time a large number of empties came into Oakland from south of Oakland, Roseburg, etc. and were placed on Martin's spur; and as to these cars there is no evidence in the record of any "specific orders" being in existence.

Also during the complaint period cars loaded with materials destined for use in the plant of Martin at Oakland (to the number of not less than 11 according to Southern Pacific's Exhibit No. 42 - R. 818) were placed for unloading on Martin's track and were appropriated for re-loading to transport boxes or lumber to Martin's customers. There is no pretense that these cars were "applied" or "counted" or otherwise considered in response to any "specific car orders" or that the appropriation of these cars was not a reasonable request for their use.

It ill behooves the Commission, an agency of the United States, to state to this Court (Commission Brief, page 29) that the record shows that Martin was fur-

nished all the cars for which it placed specific orders during the nine-month period covered by the complaint, when the Commission in the official report in this same matter has found and determined that these "specific orders" refer to written car order blanks, which "were to a large extent nothing more than a written confirmation, for the defendant's records, that the complainant wanted the cars that had been assigned to it for that day" (R. 119) and when the Commission in this same matter has officially concluded that after June 30 in the complaint period "more cars were furnished than were requested by written orders, though some delays were experienced; that complainant desired, required, and attempted to secure additional cars from defendant" (R. 124-25).

The trial judge went into this situation in detail and concluded: (R. 65)

> "I have previously held that the written car orders placed by plaintiff with the defendant were no indication of the number of cars required, needed, or requested by the plaintiff and that the plaintiff made reasonable requests within the meaning of the Act for all of the freight cars which it required.
>
> "The Commission found that, during the complaint period, plaintiff had orders for and could have operated at capacity except for the lack of freight cars; that the plaintiff required 13 freight cars a day to operate at capacity. The Commission also referred to the testimony of one of the plaintiff's witnesses who testified that the quota of plaintiff was only 5 cars a day, the same that had been assigned to the former owner who only operated a lumber mill and had no box manufacturing facilities, but that plaintiff's quota would be raised to 10 cars a day."

The Commission in the brief next misnames its conclusions of law as "ultimate finding of fact" (p. 30), and then sets forth the testimony before the Examiner of Mr. Nelson (Brief p. 31), concerning the lack of cars during the complaint period: "why we received thousands of complaints, by letter, by telegram, by telephone, by word of mouth and otherwise." The Commission assigns no reason why Mr. Nelson's testimony to this effect should have more evidentiary value than that of Mr. J. B. Egan, of the Transportation Research Bureau of Southern Pacific, who testified before the Commission on April 30, 1947, (R. 791-792): "Well, the information that I am able to obtain right at the present time, particularly in the handling of lumber in the State of Oregon, there is no shortage of cars on Southern Pacific at the present time."

Finally the Commission in its brief (p. 32) winds up with the astounding statement that the record fails to show that the appellee was subjected to competition since it produced only boxes and was not engaged in the sale of lumber as such, and in the absence of proof of competition and allegation of undue prejudice cannot be sustained.

The record abundantly shows and the Commission had previously found (R. 122-124 - see also Exhibit 11 - R. 775) that during the complaint period Martin was producing, transporting and selling lumber, requiring during this period 50 cars per month and being shorted during this period 114 cars for rotary cut lumber and 65 cars for sawn lumber. It is difficult to understand how

or why the Commission should suggest to this Court at this time that Martin was not engaged in manufacturing and transporting and selling lumber as well as boxes.

Furthermore, under the law discrimination in favor of an immediate competitor of a shipper is not the only discrimination prohibited by the Interstate Commerce Act. As was stated by the Supreme Court of the United States in the case of U.S. v. B. & O. R. Co., 333 U. S. 169, 68 S. Ct. 494, "The Interstate Commerce Act is one of the most comprehensive regulatory plans that Congress has ever undertaken. The first Act, and all amendments to it, have aimed at *wiping out discriminations of all types,* State of New York v. United States, 331 U.S. 284, 296, 67 S. Ct. 1207, 1213, and language of the broadest scope has been used to accomplish all the purposes of the Act. United States v. Pennsylvania R. Co., 323 U.S. 612, 616, 65 S. Ct. 471, 473, 89 L. Ed. 499." (Emphasis supplied).

In this statement concerning competition the Commission mis-states the facts and mis-applies the law.

THE BRIEF OF APPELLANT, SOUTHERN PACIFIC COMPANY

The appellant, Southern Pacific Company, in its brief before this Court, as did the Commission in its brief, adopted the device of designating the conclusions of law in the report of the Commission as findings of fact. This device is used repeatedly throughout the brief of this appellant, and the brief goes so far as to urge the doctrine of "administrative finality" (Brief p. 14) to these conclusions of law.

After an extensive hearing before the Examiner, the Examiner made a comprehensive proposed report (R. 84-106, inclusive). Upon exceptions to this proposed report by appellant, Southern Pacific Company, and after oral argument, the Commission itself made a comprehensive report (R. 108-126, inclusive). The Commission did not find the facts to be different in any essential from those found by the Examiner, but as Judge Solomon stated in his opinion (R. 56):

> "Except for the findings of the Commission above quoted under the heading, 'Conclusions,' the statement of the evidence and the findings of the Examiner were practically identical to those of the commission. The Examiner recommended an award of reparations and the Commission dismissed plaintiff's complaint."

The Commission commenced its report with the statement, "Our conclusions differ from those recommended by the examiner." (Second sentence of report - R. 108).

There were two issues before the District Court. One was to determine whether upon the whole record the findings of fact made by the Commission had a substantial basis in the record, or were, in the words of the Administrative Procedure Act, "unsupported by substantial evidence". The record demonstrated beyond peradventure that the findings of fact of the Commission, which were practically identical with those of the Examiner, were supported by substantial evidence, and at no place in the brief of appellant, Southern Pacific, was any showing made that the facts as so found were not supported by substantial evidence.

The only other issue was whether the conclusions of the Commission as a matter of law logically followed the facts found by the Commission, or in other words were these conclusions contrary to law. This issue was not met in the brief of Southern Pacific. Judge Solomon with great care and in detail examined the conclusions of the Commission (R. 57-73). We will consider these in the same order as Judge Solomon considered them.

The first conclusion is that for a time Martin received practically all the cars for which there were written car orders, and later received more cars than were requested by written orders. As Southern Pacific in its brief admits (p. 9, 43, 45 etc), written requests for cars were unnecessary and oral requests for cars were just as reasonable; and as Judge Solomon stated, the findings of the Commission showed continuous requests to secure additional box cars to partially satisfy Martin's urgent need for such cars (R. 58). Hence, this conclusion of

the Commission has no bearing on any issue in the case and, "if the Commission did premise its dismissal of plaintiff's complaint on this portion of its conclusions, then it is erroneous as being contrary to law" (R. 61).

The next conclusion of the Commission is that Martin desired, required and attempted to secure additional cars and, as stated by the trial judge, this conclusion is supported by substantial evidence and is, of course, favorable to Martin's claim for reparation.

The next conclusion of the Commission is that Southern Pacific made reasonable and sometimes successful efforts to furnish additional cars. Judge Solomon demonstrated that there was no substantial evidence to support this conclusion since the only evidence in the entire record was that on several occasions an employee of Martin, on days when no cars were assigned to Martin, induced Southern Pacific's employees to reconsider and assign a car for Martin's plant, and a reasonable effort implies conduct in accordance with the statutory duty of Southern Pacific not to prefer any particular person, company, locality or territory, and likewise its statutory duty in case of a car shortage to treat shippers fairly, if not identically. Hence, the only effort shown in the record to secure more cars is that of Martin's employees, not of Southern Pacific's employees.

The next conclusion of the Commission is that Martin was unable to fill orders of its customers by reason of Martin's inability to secure cars. The evidence amply supported this conclusion.

The next conclusion of the Commission is that during 1947 there was in general a shortage of freight cars, and the Court commented that the evidence upon which this conclusion was based supported the conclusion.

The next conclusion of the Commission is that it was not shown that the Southern Pacific unduly favored shippers other than Martin. Judge Solomon demonstrated from the findings of fact of the Commission, among them that Southern Pacific furnished other shippers an average of 80 per cent of the cars required by them, and shippers at competitive points all cars desired by them, and that Martin could have operated at capacity except for the lack of freight cars, and required 13 cars a day to operate at capacity, and received an adjusted total of an average of 3.1 cars each day, that considering the whole record there was no substantial evidence upon which the Commission could have based this conclusion.

The next conclusion is that Martin failed to establish any violation of Sections 1 and 3 of the Interstate Commerce Act. The Judge determined that this ultimate conclusion, in view of the whole record, was not supported by substantial evidence and was contrary to law.

The words of the Supreme Court of the United States in the case of U.S. v. B. & O. R. Co., supra, that the Interstate Commerce Act and all amendments to it have aimed at wiping out discriminations of all types, amply confirm the soundness of Judge Solomon's decision in this respect.

The final conclusion of the Commission is that the evidence falls short of the requirements in a proceeding of this character to support an award of reparation. As to this conclusion Judge Solomon stated that the record does contain evidence of damage supporting an award of reparation. The findings of the Commission, at pages 121 to 124, inclusive, of the record, amply demonstrate the soundness of this statement of the Court.

Before ourselves concluding this brief, we desire to call to this Court's attention a few of the many misstatements of fact occuring in the brief of Southern Pacific.

This appellant states (p. 51) that Martin Brothers "candidly shows that it cancelled certain of the car orders placed by it during the complaint period." There is no evidence in the record that Martin at any time cancelled any car order, the evidence on the contrary being that every possible effort was devoted to the obtaining of additional cars. (See, however, the testimony of Martin's president (R. 344), "if they were cancelled, they were cancelled for the reason that they were either too dirty to load or there were holes in the roof that you could look through.")

The only orders cancelled were those of customers of Martin whose orders Martin could not fill because of lack of cars (R. 182; R. 113).

Southern Pacific repeats in its brief the several times discredited contention (p. 48) that Martin held 200 cars for periods ranging from three to eight days during the complaint period.

The Commission found (R. 120) that most of the cars placed on Martin's track remained only one or two days, and:

> "One car was on hand on 7 days, 2 cars were on hand on 6 days, 11 cars were on hand on 5 days, 22 cars were on hand on 4 days, and 56 cars were on hand on 3 days. The complainant indicates that these may have been cars that were restricted for loading to particular destination areas for which it had no immediate traffic available."

When the same contention was made before the trial court an analysis of the exhibits of Southern Pacific was made and Judge Solomon showed (R. 72):

> "2. A great majority of the cars were moved out within 2 days.
> 3. When a car was held for more than 3 days, from 13 to 23 other cars were moved in, loaded, and moved out within such period.
> 4. Of the 664 cars furnished during the complaint period, only 36 were found to be on plaintiff's siding for more than 3 days, when the daily 7 a.m., track check was made.
> 5. During the months of August and September, 35 per cent and 60 per cent of all cars furnished plaintiff were not box cars, but were refrigerator, stock, flat or gondola cars. The same situation obtained, to a lesser extent, in other months during the complaint period. A number of these cars were of limited value to the plaintiff. The automobile and refrigerator cars were restricted to particular destinations and the refrigerator cars could only be used for the shipment of boxes and they could only be loaded by hand."

Yet Southern Pacific would ask this Court to believe that 200 cars were held by Martin for periods up to eight days for lack of business.

CONCLUSION

This is essentially not a difficult case. The facts are relatively simple and undisputed. The reasons at a time when cars were in short supply for the discrimination practiced by Southern Pacific against Martin are obvious

First, Martin is located on Southern Pacific's Siskiyou Line, which Southern Pacific's witness, Poole, testified (R. 466) is a costly line to operate because of its rate of grade. Thus, the Cascade Line, which was built at a cost to Southern Pacific in excess of Forty Million Dollars in order to eliminate the difficulties in operating over the Siskiyou Line, is the "favorite line" of Southern Pacific and is one of the reasons why the service is a "little slower" on the Siskiyou Line.

Second, Southern Pacific was fully aware that Martin was engaged in the manufacture of products that could be reasonably shipped by rail only; that Southern Pacific was the only railroad which served Martin's Oakland plant and that if Southern Pacific did not transport Martin's products no one else could. There was no competition.

Third, as Southern Pacific's Freight Traffic Manager asserted to Martin's president in one instance when the president was complaining about not receiving cars, he was asked if he expected Southern Pacific to take cars from other shippers with a "good heavy pay-bottom load" and give them to Martin for wirebound boxes. In a standard box car, about 40,000 pounds of boxes or

about 80,000 pounds of lumber can be loaded (R. 114-115).

Fourth, Southern Pacific desired a long haul over its lines to Ogden, rather than the short haul to Portland. On July 16, 1947, the District Freight Agent of Southern Pacific at Medford wrote to Martin at Oakland (Exhibit No. 1, R. 703) telling Martin, "We must have our long haul via Ogden if we are to prosper and extend you satisfactory service."

However obvious the reasons for the discrimination, the discrimination itself is prohibited by the Interstate Commerce Act, and the judge of the District Court was in every respect correct and should be affirmed.

Respectfully submitted,

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Certificate of Service

I hereby certify that I have this day served the foregoing brief upon counsel for appellants by mailing by first class mail three copies thereof addressed to Edward M. Reidy and Samuel R. Howell, Interstate Commerce Commission Building, Washington 25, D. C. and one copy thereof addressed to William L. Harrison, Interstate Commerce Commission, 1056 Flood Building, San Francisco 2, California, and one copy thereof to James E. Lyons and Charles W. Burkett, Jr., 65 Market Street, San Francisco 5, California, and by delivering three copies to James C. Dezendorf and George B. Campbell, 800 Pacific Building, Portland 4, Oregon.

Dated at Portland, Oregon, this 12th day of May, 1954.

IRVING RAND
Of Counsel for Appellee,
The Martin Brothers Box Company.